

LFC Requester:**Connor Jorgensen**

**AGENCY BILL ANALYSIS
2016 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original X **Amendment**

Correction **Substitute**

Date 1/14/16

Bill No: HB 96

Sponsor: Rep. Matthew McQueen

Agency Code: 305

Short Title: RELATING TO PUBLIC OFFICIALS; MAKING A PUBLIC OFFICIAL INELIGIBLE TO RECEIVE A PENSION IF THE PUBLIC OFFICIAL IS CONVICTED OF OR HAS PLED GUILTY OR NOLO CONTENDERE TO A CORRUPTION OFFENSE.

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

Synopsis:

This bill enacts a new section of the Public Employees Retirement Act, providing that "public officials" who are convicted of or plead guilty or no contest to a "corruption offense" are ineligible to receive state pension benefits based on time served as a public official. The bill defines "public official" as a person elected to a position covered by the Campaign Reporting Act or a person "appointed to an office that is subject to an election covered by that act." Thus, the bill would not apply to the majority of public employees, who are neither elected nor appointed to an elective office.

As defined by the bill, "corruption offense" includes a range of specifically enumerated felonies and conspiracy to commit those felonies. The enumerated crimes are generally white collar offenses including fraud, embezzlement, accepting bribes, money laundering, and other crimes of that nature, including violations of the Governmental Conduct Act and Campaign Reporting Act. This definition of "corruption offense" is limited specifically to felonies. There is no requirement, however, that the felony be committed in connection with public office.

Under the terms of this bill, a public official would become ineligible to receive pension benefits accrued while serving as a public official if he or she is convicted of or pleads to a covered offense "after the official's first election to public office." Thus, under the language of this bill, loss of pension is based on the date of the conviction, not the date of the offense.

If a public official loses pension benefits under this bill, the official is entitled to a return of the official's employee contributions. Both this refund and any loss of benefits, however, are subject to any existing community property interests or child support orders.

The bill is generally similar in structure and effect to public pension forfeiture provisions in other states.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

There is a danger that the courts would deem this bill an unconstitutional ex post facto

law. Both the United States and New Mexico constitutions prohibit ex post facto laws. U.S. Const. art. 1, § 10, cl. 1; N.M. Const. art. 2, § 19. Under these constitutional provisions, penal legislation cannot apply retroactively to increase the penalty of crimes that have already been committed. *E.g., State ex rel. Foy v. Austin Capital Management, Ltd.*, 2015–NMSC–025, ¶ 26, 355 P.3d 1.

Because this bill is framed as a matter of “eligibility,” one could argue that it is merely “civil and remedial” rather than “penal.” *Cf. Yepa v. State Taxation and Revenue Dept.*, 2015–NMCA–099, ¶¶ 18–35, 358 P.3d 268. The determination of whether an act is “penal,” however, is a multi-factored and nuanced legal analysis. *Id.* Given that loss of benefits would be a direct consequence of conviction, there is a strong possibility that courts would view this bill as penal legislation intended to punish corrupt public officials.

The bill would clearly be retroactive. Under the bill’s terms, eligibility is based on the date of conviction, not the date of the offense. Further, the bill applies to any convictions dated after the official assumes office, not after the bill is enacted. Thus, it would apply to a public official who committed a covered crime in 2015, for example.

If the bill is both penal and retroactive, it is unconstitutional. U.S. Const. art. 1, § 10, cl. 1; N.M. Const. art. 2, § 19.

While this is a significant issue, it does not require a complex resolution. The bill would pass constitutional muster if it makes clear that it applies only prospectively, to crimes committed after its effective date.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

The bill does not provide a requirement or mechanism for PERA to be notified when an official is convicted of a covered crime. It is therefore not clear how PERA would get notice to stop any pension payments and refund any accumulated contributions. It would likely be an administrative burden on PERA to identify and monitor ongoing criminal prosecutions involving public officials. One solution might be to require the district court to notify PERA when a case involving a covered crime becomes final.

The bill also does not provide for any stay of the forfeiture pending an appeal of a criminal conviction. In this respect, the bill resembles provisions in other states, many of which do not include a stay pending appeal. In the event that a conviction was reversed on appeal, however, PERA may have to compensate the official for missed payments. This could be an administrative burden.

Finally, this bill provides only for forfeiture of benefits earned while the official held an elective office or was appointed to elective office. Thus, in the case of an official who had also earned benefits through previous employment in a rank-and-file position, the effect of the bill would seem to be a partial forfeiture. This could lead to administrative difficulties for PERA because the system would have to properly account for partial forfeitures, which do not appear to currently exist in the state retirement system.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

The bill includes a discrepancy regarding what triggers ineligibility. Subsection (A), the forfeiture provision, refers to both convictions and guilty or no contest pleas. Yet subsection

(E)(1), defining covered crimes, refers only to “a conviction.” This creates an ambiguity as to whether a conditional discharge triggers ineligibility. A conditional discharge typically involves a guilty or no contest plea, but is not considered a “conviction” in New Mexico criminal law. *E.g., State v. Harris*, 2013–NMCA–031, ¶ 3, 297 P.3d 374. Therefore, subsection (A) of the bill would seem to cover a conditional discharge, but subsection (E)(1) would not.

There is also a discrepancy between subsection (A), which appears to forfeit only benefits “for any time served as a public official” and subsection (C), which requires refund of “any amounts” contributed by the official. It is not clear how these provisions would interact in the case of a person who made contributions and accumulated service credit as an ordinary employee and was later elected to a covered position. The bill should be clarified so that subsection (C), pertaining to refund of accumulated contributions, requires refund of only those contributions attributable to the time for which benefits are lost under subsection (A).

Finally, the bill does not make clear how PERA would have to handle the case of a person who loses benefits under the law but is subsequently pardoned and re-elected.

OTHER SUBSTANTIVE ISSUES

The bill relies exclusively on a list of enumerated crimes, which it defines as corruption offenses. It does not have a catch-all for other crimes committed in connection with public office. That means that, for example, an official who commits a sex offense on the job would not necessarily lose his or her pension benefits. In that case, the pension would only be forfeited if the facts somehow supported a covered crime such as extortion or intimidation of a witness.

On the other hand, with respect to crimes that are specifically covered, there is no requirement that they be connected to the official’s public position (unless public employment is a pre-existing element of the crime). That means this bill leaves open the possibility that an elected official could lose his or her pension for committing a crime that has nothing to do with his or her position. For example, if an official runs an unrelated business and commits a fraud in the course of that business, pension benefits would be lost.

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If this bill is not enacted, the status quo will be maintained. Public officials who commit felony corruption offenses will continue to enjoy public pension benefits.

AMENDMENTS